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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

TAYLOR L. THOMSON,

Plaintiff and Respondent,

v.

PAMELA W. MILLER,

Defendant and Appellant.

B187680

(Los Angeles County
Super. Ct. No. BC291434)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Gregory W. Alarcon, Judge. Affirmed.

Goldberg & Gille and Steven P. Goldberg; Joseph M. Barrett; David
Hoffman; Lisa Maki; and Michael L. Cohen for Defendant and Appellant.

Greenberg, Glusker, Fields, Claman & Machtinger, Robert S. Chapman and
Stephen S. Smith for Plaintiff and Respondent.

Defendant Pamela Miller appeals from the trial court's order denying her motion to set aside the default judgment entered against her on the complaint filed by plaintiff Taylor Thomson.¹ We affirm.

BACKGROUND²

Thomson's Complaint

Thomson sued Miller in Los Angeles Superior Court for malicious prosecution and breach of contract. According to Thomson's complaint, Thomson employed Miller as a nanny pursuant to a written contract executed in September 2001 that contained a confidentiality clause prohibiting disclosure of confidential information about, inter alia, Thomson and Thomson's family. In late 2002, Miller threatened to disclose confidential information in violation of the confidentiality agreement unless Thomson paid a financial settlement. Thomson refused. In January 2003, Miller sued Thomson in superior court for wrongful termination, breach of contract, interference with prospective economic advantage, and intentional infliction of emotional distress. After Thomson removed the action to federal district court, Miller voluntarily dismissed the action in February 2003. Thomson's instant suit against Miller for malicious prosecution and breach of contract followed.

¹ Miller also purported to appeal from the default judgment itself. On Thompson's motion, we dismissed that portion of the appeal, on the ground that the notice of appeal was untimely.

² We denied Miller's request for judicial notice of certain documents, none of which were part of the record of her motion. We therefore do not discuss these documents, and disregard the references to them in Miller's briefs.

The Prior Appeal

Miller did not file an answer to Thomson's complaint. Rather, she filed a motion to strike the complaint under Code of Civil Procedure section 425.16.³ The trial court granted the motion as to Thomson's malicious prosecution claim, but denied it as to the breach of contract claim. On appeal, in an unpublished opinion, we reversed the trial court's grant of Miller's motion to strike the malicious prosecution claim, and affirmed the denial as to the breach of contract claim. The remittitur issued November 24, 2004.

The Default Judgment

On December 2, 2004, Miller filed a substitution of attorney in the trial court. The substitution form stated that Miller would be representing herself, and listed a Palm Springs address.

On December 6, 2004, the trial court scheduled a case management conference for January 10, 2005. Thomson's counsel served notice of the case management conference on Miller by mail at the Palm Springs address listed on Miller's substitution of counsel form. Miller failed to appear for the case management conference. The trial court continued the conference to February 18, 2005, and issued an order to show cause regarding, inter alia, entry of Miller's default for failure to file an answer to Thomson's complaint. Again, Thomson's counsel served notice on Miller by mail at the Palm Springs address.

Miller failed to appear for the February 18th hearing. The trial court ordered that Miller's default be entered, and directed Thomson to file the appropriate

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All undesignated section references are to the Code of Civil Procedure.

documents for entry of default and default judgment. Thomson's counsel served Miller by mail with notice of the orders at the Palm Springs address.

Thomson filed the appropriate documents, and on April 27, 2005, the court issued a default judgment against Miller for damages (plus interest) of \$113,946.82. The court also issued a permanent injunction restraining Miller from violating her confidentiality agreement with Thomson.

Miller's Motion to Set Aside the Default and Default Judgment

On June 20, 2005, Miller, representing herself, filed a motion under section 473, subdivision (b), to set aside her default and the default judgment for mistake or excusable neglect. In support of the motion, Miller filed a declaration in which she stated that her former attorney "[a]pparently . . . worked very hard on this matter, making motions, which were appealed and returned to this court in September 2004." In November 2004, Miller's "money ran out" and her attorney "demanded" that she sign the substitution of attorney form. Miller signed the form "under . . . pressure" from the attorney and his staff. She "was scared that [she] could get into trouble if" she did not sign. Miller understood that she would be representing herself. But the attorney did not advise her on the status of the case, and did not tell her that she would have to answer the complaint or suffer a default. The attorney also did not point out that the address listed for Miller on the substitution form was the Palm Springs address. This was her parents' address. Miller had not used this address since before January 2005. She had had a "falling out" with her parents, and did not communicate with them between January and May 2005. Therefore, she did not receive any mail sent there until May 2005, when her father gave her the mail taped in a bundle.

Miller declared that she had represented herself "for part of the time this case was in federal court." When significant events were about to occur in federal

court, she would receive notice from the court clerk. Based on this experience, Miller received “the wrong impression that [she] would also hear from the state court before serious events happened.” Miller did not learn of the default judgment until May 24, 2005, when she received notice from the County Recorder.

Miller also submitted a declaration from her father, Richard Miller, who declared that he had no contact with Miller from January 3 to April 16, 2005. He collected her mail, and gave it to her on April 16, 2005.

In her motion, Miller sought relief from default on the ground that her declaration and that of her father demonstrated excusable neglect or mistake within the meaning of section 473, subdivision (b). She referred generally to the principle that relief under section 473, subdivision (b), should be liberally granted, and mentioned that mandatory relief is required on an attorney’s declaration of fault. She also argued that the default judgment should be set aside on equitable grounds. The equitable ground identified was Thomson’s purported failure to prove the necessary elements of the malicious prosecution and breach of contract claims.

Thomson’s Opposition

Thomson opposed Miller’s motion. Thomson argued that Miller’s claim that she did not receive her mail and was unaware of her obligation to file an answer to Thomson’s complaint failed to create grounds for relief under section 473, subdivision (b). Thomson also produced evidence showing that Miller used the Palm Springs address in unrelated litigation. In particular, Thomson showed that in December 2004 Miller, represented by counsel, sued other former employers in Riverside Superior Court. The case was still pending, and Miller had been represented by counsel throughout. Attached to Miller’s amended complaint in the Riverside action were two complaints Miller had filed with the Department of Fair Employment and Housing dated February 1, 2005. The complaints, signed by

Miller under penalty of perjury, listed the Palm Springs address as Miller's address.⁴ Miller received a right to sue letter on both DFEH complaints, which were also attached to her amended complaint in the Riverside action.

Miller's Reply

In reply to Thomson's opposition, Miller filed another declaration seeking to explain the circumstances of her default. She stated that her "former attorney had been handling the case [filed against her by Thomson] since its inception in March 2003." Miller "did not find out that an answer had never been filed until a paralegal printed the 'Case Summary' . . . from the court's web site on June 8, 2005 and pointed out that no answer to the complaint had ever been filed." Miller reiterated that her former attorney did not advise her that she needed to file an answer. Miller also declared that she "did not know in September 2004 [that] the appeal was returned [to the trial court]. [Her] statement in [her] previous declaration [regarding such knowledge] was a statement of [her] knowledge as of June 2005, not then."

Miller stated that the attorney who represented her in the unrelated Riverside lawsuit she filed against other former employers does not represent her in the instant case, and did not advise her "about law or process." In explaining her use of the Palm Springs address on her DFEH complaints in the Riverside litigation, Miller declared: "I intentionally allowed my parents' address to remain on [the] document[s] because of the continued unlawful surveillance by Anthony Pellicano at the behest of Plaintiff Taylor Thomson, which is, in part, the subject of the underlying complaint herein and which also gave rise to 4 lawsuits by Plaintiff

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One of the complaints erroneously listed a "5" rather than a "6" in the address.

Taylor Thomson against me. Taylor Thomson has sued me twice in Canada, three [times] in the United States and summoned me to testify in Canada in the child custody matter between Thomson and her daughter's father. In the latter matter I testified truthfully against Thomson which initiated the ensuing surveillance and 3 years of litigation between us and Thomson's desire to crush me, which she has generally succeeded in doing."

Miller stated that "Anthony Pellicano is currently in federal prison for the same activities I have complained of in the underlying suit," and that a newspaper report suggested that Thomson's lead attorney might be facing indictment in the scandal. According to Miller, in April 2003 she was subpoenaed to testify before a federal grand jury looking into the matter. Miller had been informed that after Pellicano's arrest in Spring 2004 Thomson had hired a former FBI agent to continue the surveillance.

Miller further declared: "In December 2004 David C. Goodwin of DCG Investigations directly approached my parents and attempted to gain entry into their home. He asked my father a barrage of questions about me, including how often my father saw me and where I was. He even left his business card, which my father gave to me. . . . Goodwin, without invitation, did enter my father's garage where many of my belongings were stored and began to peruse them until finally leaving after being questioned about his relationship to Anthony Pellicano by my father. . . . [¶] I moved from part-time residence in my parents home on or about January 3, 2005 because I was scared of further surveillance, further harassment of my parents and the impact the stress could have on [my] mother's heart condition. [¶] I left my parents['] address on the DFEH complaint[s] for the purpose of avoiding further harassment. At the time I signed the DFEH complaint I was living in Tustin. This is reflected in the fact that my signature on the DFEH Complaint shows that I was in Tustin when I signed it."

Hearings on the Motion

The trial court held two hearings on the motion – on July 15 and September 27, 2005. At the July 2005 hearing, the court issued a tentative ruling denying the motion. The court then heard argument and took the motion under submission. The court later issued a minute order scheduling a hearing with live testimony.

At the September 2005 hearing, Miller called her father, Richard Miller, as a witness. He testified that in December 2004 he had seen investigator David Goodwin around the condominium complex where he lived. He asked Goodwin what he was working on. Goodwin would not directly answer the question, and when questioned said that he had never heard of Anthony Pellicano. Richard Miller also testified that his wife was in poor health, and that he felt harassed during the period that his telephone had been tapped.

Miller also called Howard Lasky, who testified that from January through April 2004 he had had daily contact with Miller, who was then residing in Tustin and working as a nanny. Miller gave Lasky her telephone number and address.

Thomson produced a declaration from the attorney representing Miller's former employers in the Riverside lawsuit filed by Miller. The attorney stated that he employed investigator Goodwin in connection with that litigation.

The Trial Court's Ruling

The trial court took the matter under submission, and later issued a detailed written ruling denying Miller's motion to set aside the default. The court concluded that Miller failed to demonstrate excusable neglect. The court reasoned in part: "The reality in this case is that Miller did nothing to keep [herself] informed about the progress of the case. If her former attorney pressed her to sign [a substitution of attorney] form in November, 2004, she should have been aware

of the Remittitur and reversal of the motion to strike that occurred in September. There is no statement, let alone evidence, that between December, 2004 and receipt of mail in May that she did anything whatsoever to find out about this case. No reasonable person would fail to keep informed about the case. This is particularly true where she had represented herself in the past, signed [the substitution of attorney] form, and knew the case was ongoing.”

The court noted that Miller claimed to have expected the court to contact her when significant events occurred. But this claim created a “glaring question” as to where the court was to reach her. She declared that she did not reside at the Palm Springs address listed on the substitution of attorney form she filed with the court, but she never provided the court with any other address or any telephone number. The court concluded that “[t]here is ample evidence that Miller either was able to receive calls and mail at the address she consistently used or that she failed to provide any other address or phone number to any party or to the court. A reasonably prudent person in this situation would at the very least call the court to inquire as to the progress of the case.”

DISCUSSION

Section 473, subdivision (b), gives the trial court the power to grant relief to a party “from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.” When the application for relief is accompanied by an affidavit of fault from the party’s attorney, relief is mandatory.⁵ (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th

⁵ In that situation, section 473, subdivision (b) provides: “Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney’s sworn affidavit attesting to his or her mistake,

674, 681.) When, as in the instant case, there is no attorney affidavit of fault, the granting of relief lies in the trial court's sound discretion. (*Ibid.*; *Iott v. Franklin* (1988) 206 Cal.App.3d 521, 527 (*Iott*).) Although relief is to be liberally granted, the moving party nonetheless bears the burden of demonstrating grounds for relief, namely, that the conduct which resulted in default was that of a reasonably prudent person under the same or similar circumstances. (*Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 276; *Ebersol v. Cowan* (1983) 35 Cal.3d 427, 435; *Jackson v. Bank of America* (1983) 141 Cal.App.3d 55, 58 (*Jackson*).) On appeal from denial of discretionary relief under section 473, subdivision (b), "we indulge all legitimate and reasonable inferences to uphold the judgment and reverse only upon a showing that the trial court exceeded the bounds of reason in light of all the circumstances." (*Ayala v. Southwest Leasing & Rental, Inc.* (1992) 7 Cal.App.4th 40, 44; cf. *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1283.)⁶

In the instant case, the trial court did not abuse its discretion in concluding that Miller's conduct resulting in her default was not that of a reasonably prudent person under the circumstances. Upon the filing of the substitution of attorney form, Miller knew that she would be representing herself. Even if her attorney pressured her to sign the substitution form and did not explain that she was

inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise or neglect."

⁶ Miller contends that our review should be de novo, because the trial court applied incorrect legal standards. As we explain below, Miller's attacks on the trial court are not supported by the record.

obligated to file an answer to Thomson's complaint, a reasonable person in Miller's position would have taken *some* timely action to determine the status of the case and protect her rights. Miller did nothing. Her claim that she thought the court would contact her about important events is of questionable reasonableness, even assuming she accurately described her prior experience in the federal court. Nonetheless, as the trial court accurately noted, Miller failed to provide the court (as well as opposing counsel) with any means of contacting her. She claimed that she could not be timely contacted at the Palm Springs address listed on the substitution of attorney form. Assuming that to be true, her inexcusable neglect is amply demonstrated by her failure to note that the Palm Springs address was listed on the substitution of attorney form, her failure to provide the court or opposing counsel any other address at which she could be served with relevant documents, and her failure to make any provision for timely receipt of mail she knew would be sent to the Palm Springs address. Further, Miller was represented by counsel in her Riverside lawsuit. Even assuming that this attorney did not advise Miller "about law or process," a reasonable person in Miller's position, wishing to learn the status of Thomson's case against her, would have at least made a simple inquiry of her counsel in the Riverside case about how to keep advised of events in the Thomson case. Miller presented no evidence that she made such a simple inquiry, and rather appears to contend that she had no obligation to take any steps after filing her substitution of counsel form.

According to the testimony of Howard Lasky at the September 2005 hearing, from January through April 2004 Miller lived in Tustin and worked as a nanny. In her declaration in support of her reply, Miller claimed that she left her parents' Palm Springs residence (and apparently moved to Tustin) because of alleged illegal surveillance and harassment by investigators hired by Taylor or her counsel. However, the event that caused Miller's "falling out" with her parents,

leading to her move, was the December 2004 visit of investigator Goodwin to her parents' home. At the September 2005 hearing, Thomson presented the declaration of the attorney representing Miller's former employers in the Riverside lawsuit. In that declaration, counsel stated he had hired Goodwin in connection with the Riverside litigation. Thus, the uncontradicted evidence presented to the trial court was that Thomson and her attorneys were not involved in the particular surveillance that allegedly led Miller to "go into hiding." Further, even assuming Miller's allegations of nefarious conduct by Thomson and her attorneys are true (and we do not mean to imply that they are), the allegations have no reasonable relationship to her inexcusable failure to ensure that she could be apprised of developments in Taylor's lawsuit against her.

On appeal, Miller levels a number of attacks on the trial court's ruling. She contends that the trial court applied the wrong legal standard, in that the court failed to "apply the 'untrained person' standard," and failed to "understand and consider Miller's circumstances." These challenges express nothing more than dissatisfaction with the trial court's reasoning. The record shows that the trial court fully understood the relevant legal standard, and thoughtfully applied it. Further, Miller's status as a self-represented litigant did not entitle her to any special consideration (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444), and did not relieve her of her burden of demonstrating that her conduct was reasonable under the circumstances.

Miller argues that the trial court erroneously believed that she was relying on the provision for mandatory relief based on an attorney affidavit of fault. However, Miller herself cited that provision in her moving papers. The trial court simply explained why that standard did not apply to a self-represented litigant.

Miller argues that the trial court erroneously required her to prove excusable neglect by a preponderance of the evidence. However, the trial court appropriately

cited *Iott, supra*, 206 Cal.App.3d at page 527 for this proposition. Contrary to Miller's contention, the preponderance standard is not inconsistent with liberal application of section 473, subdivision (b). Liberal application of section 473, subdivision (b), is a general judicial policy, but this policy does not relieve the moving party of the burden of proving circumstances showing excusable neglect. (*Iott, supra*, 206 Cal.App.3d at p. 527; *Kendall v. Barker* (1988) 197 Cal.App.3d 619, 624; *Jackson, supra*, 141 Cal.App.3d at p. 58; *Davis v. Thayer* (1980) 113 Cal.App.3d 892, 905.)

Miller contends that the court erred in failing to address her request for equitable relief from the judgment. A trial court's equitable power to grant relief from judgment may be exercised when fraud or other conduct by a party's opponent has prevented the party from presenting a defense to the action. (See *Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 341-315 (*Gibble*); see generally 8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 223, pp. 727-728.) According to Miller, she proved extrinsic fraud or mistake, based on her evidence that she went into hiding because of harassment by plaintiff and her investigators. However, in her papers and oral arguments in the trial court Miller relied on this evidence not as a ground in equity to set aside the default, but rather as an explanation of why her failure to ensure she could be contacted at her parents' Palm Springs address was excusable neglect under section 473, subdivision (b). Her request for equitable relief, made in her moving papers, was based on Thomson's purported failure to submit sufficient evidence in her default prove up documents. Therefore, to the extent Miller now seeks equitable relief on the basis of supposed harassment by Thomson or her attorneys, she has forfeited the claim on appeal. (See *Gonzalez v. County of Los Angeles* (2004) 122 Cal.App.4th 1124, 1131 [other than pure issue of law, reviewing court will not consider issues raised for first time on appeal].)

In any event, Miller failed to prove grounds for equitable relief. As we have noted, the event that allegedly led her to leave her parents home was the visit of investigator Goodwin, an event for which Thomson and her attorney's were not responsible. Further, as we have also observed, even if Miller's allegations of misconduct by Thomson and her attorneys are true, they bear no reasonable relationship to the cause of Miller's default: her unreasonable failure to take some action – any action – to be apprised of the status of the lawsuit after the filing of her substitution of counsel form. Finally, a requirement for obtaining equitable relief is a showing that the defaulted party has a meritorious case. (*Gibble, supra*, 67 Cal.App.4th at pp. 315-317.) Miller failed to show that she would have defeated Thomson's claims for malicious prosecution and breach of contract. For all these reasons, she failed to prove equitable grounds for relief.

Finally, Miller contends that the terms of the injunction entered by the trial court are unconstitutionally vague. However, the portion of her appeal challenging the judgment has been dismissed. We therefore do not consider this contention. We note, however, that Miller fails to support the argument with citation to relevant authority, and thus the argument would be forfeited even if it could be raised. (See *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

DISPOSITION

The order denying the motion to vacate default and default judgment is affirmed. Thomson shall recover her costs on appeal.⁷

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WILLHITE, Acting P. J.

We concur:

SUZUKAWA, J.

COOPER, J.*

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Thomson has moved for sanctions on appeal, contending that Miller violated the rules of appellate procedure, and that the appeal is frivolous and taken solely to delay and harass Thomson. The motion is denied.

*Presiding Justice of the Court of Appeal, Second Appellate District, Division Eight, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.